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No. 84-6270

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHNNY GREEN, GAIL BLESSING, THERESA E. COVEYOU, GILDA MILLS, and JUDGE MILLS on behalf of themselves, their children, and all others similarly situated,

Petitioners,

v

AGNES MARY MANSOUR, in her official capacity as Director of the Michigan Department of Social Services,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

In a lawsuit against a state official under 42 U.S.C. § 1983, in which there is no live allegation of current violation of federal law and where no permanent injunctive relief restraining current or future conduct is possible, does the Eleventh Amendment prohibit notice relief and declaratory relief?

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the constitutional provision set forth in Petitioners' Brief, the following constitutional, statutory and regulatory provisions are also involved in this case. Relevant portions of these provisions are set forth in the Appendix to this Brief, beginning on page 10a.

United States Constitution, Article III, § 2, Cl. 1

28 U.S.C. § 2201

M.C.L.A. 400.37; M.S.A. 16.437

45 C.F.R. 205.10(a)(3), (4) and (5)

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This cause consists of two cases consolidated on appeal to the Sixth Circuit Court of Appeals, *Michigan Welfare Rights Organization* (MWRO) v. *Dempsey* and *Banas* v. *Dempsey*. Because the Petitioners' Statement of the Case is incomplete, misleading and contains numerous legal conclusions not supported by the record below, the Respondent presents its own Statement of the Case.

A. **MWRO v. Dempsey**

This action was filed in the U.S. District Court for the Eastern District of Michigan on April 11, 1980, (J.A. 49) challenging certain policies of the Michigan Department of Social Services (MDSS) relating to the provision of day care benefits for employed recipients of Aid to Families with Dependent Children (AFDC). The Complaint alleged that, in calculating the AFDC grant for employed AFDC recipients, the Michigan Department of Social Services wrongfully refused to deduct from the recipient's income certain child care costs, allegedly in violation of Title IV-A of the Social Security Act, 42 U.S.C. 601 *et seq.* and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution. Petitioners sought class certification, a declaratory judgment that the Respondent's policies and practices violated the Social Security Act and the Constitution, injunctive relief to prevent Respondent from continuing to enforce the challenged actions, notification to all class members of their rights to obtain an administrative hearing, and attorneys fees. (J.A. 53-65)

The challenged policy authorized payment for child care expenses, up to certain maximums, through the Title XX program, 42 U.S.C. 1397 *et seq*, for which all AFDC recipients qualified. Respondent denied that the policy violated either the Social Security Act or the Constitution. (J.A. 73-83)

Effective October 1, 1981, via the Omnibus Budget Reconciliation Act of 1981 (OBRA), P.L. 97-35, 95 Stat, 357, 933 (1981), Congress amended 42 U.S.C. 602(a)(7) and (8) by specifically setting limits on the amount of day care expenses which could be disregarded from earned income. The Michigan Department of Social Services implemented policies consistent with these amended provisions, effective October 1, 1981. (J.A. 139)

On February 9, 1982, Petitioners moved for class certification and summary judgment on the merits of their claim that Respondent's policies violated the pre-October 1, 1981 Social Security Act. They also sought an order against Respondent requiring the issuance of a notice similar to the one approved by this Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979). (R. 33A, 36) On February 9, 1982, Respondent moved to dismiss the action, claiming that the October 1, 1981 OBRA amendments rendered Petitioners' pre-October 1, 1981 claims for injunctive relief moot and that the Eleventh Amendment barred any other relief, including an order requiring the issuance of a "*Quern*-type" notice to persons who had lost benefits as a result of Respondent's policies under the old statute. (R. 34)

Petitioners made no claim that the State's post-October 1, 1981 policies or procedures regarding the treatment of child care expenses violated either the post-October 1, 1981 Social Security Act or the Constitution. Petitioners' counsel admitted, at oral argument on their motions for summary judgment on March 9, 1982, that the claims for declaratory and notice relief related only to benefits allegedly lost prior to October 1, 1981. (J.A. 151)

On June 22, 1982, the District Court issued its Order denying Petitioners' motions for summary judgment and class certification and granting Respondent's motion to dismiss the action. (J.A. 141-147)

B. **Banas** v. **Dempsey**

This case was filed on May 11, 1981, challenging the Department of Social Services' consideration of stepparent income in determining AFDC eligibility. (J.A. 4-14) Federal regulations at that time authorized states to consider step-

parent income where the stepparent "is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children." 45 C.F.R. 233.90(a)(1) (1980).

In 1980, Michigan's "Poor Law," Michigan Compiled Laws Annotated (hereinafter M.C.L.A.) 401.2; Michigan Statutes Annotated (hereinafter M.S.A.) 16.122, was amended to include a "stepparent living in the same household", along with "the father and mother" as persons who were responsible for the support and maintenance of dependent children. On March 1, 1981, the Department of Social Services amended its AFDC policy in accordance with the amended Poor Law to include consideration of stepparent income in determining AFDC eligibility. (J.A. 19)

Petitioners alleged that the Poor Law amendment was not a law of general applicability which imposed a support obligation to the same extent as that for natural or adoptive parents and, therefore, the policy of applying the Poor Law violated Title IV-A of the Social Security Act, 42 U.S.C. 601 *et seq* and the federal regulation promulgated thereunder. Petitioners also alleged that the State's policy violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Petitioners' constitutional rights of privacy and free association. The Department of Social Services denied that its policy was in violation of either the Social Security Act, 45 C.F.R. 233.90(a)(1), or the Constitution. (J.A. 4-14)

Petitioners sought class certification, a declaratory judgment that the state's policies and practices violated the Social Security Act and the Constitution, injunctive relief to prevent the state from continuing to enforce the challenged policies and practices, notification to class members of their rights to an administrative hearing, and attorneys' fees. (J.A. 13-14)

On May 28, 1981, Petitioners filed a Motion for Preliminary Injunction to enjoin Respondent from enforcing the challenged stepparent income policy during the pendency of the lawsuit. (R. 3) A preliminary injunction was granted on June 29, 1981, which was appealed to the Sixth Circuit Court of Appeals. (J.A. 25-27, R. 13) Before the appeal from the District Court's preliminary injunction could be heard, Congress amended 42 U.S.C. 602(a) to provide that, effective October 1, 1981, income of stepparents living in the same household as the AFDC recipient shall be counted for purposes of determining eligibility. 42 U.S.C. 602(a)(31). Thus, there was no longer any federal requirement that a stepparent's support obligation be founded upon state law. Accordingly, the parties stipulated to an amendment of the preliminary injunction order, making its prospective effect valid only to October 1, 1981. (J.A. 33-35) On October 27, 1981, Respondent voluntarily dismissed the appeal of the preliminary injunction order. (R. 22)

On March 19, 1982, Respondent filed a motion to dismiss the action, contending that the Petitioners' claims were mooted by the amendment to the Social Security Act and that the Eleventh Amendment was a bar to the issuance of any order sought by Petitioners. (R. 27) On April 9, 1982, Petitioners filed a motion for summary judgment, seeking a declaration that the state's pre-October 1, 1981 policies violated the pre-October 1, 1981 Social Security Act and seeking an order for issuance of a "*Quern*-type" notice. (R. 29) Petitioners admitted at a hearing conducted on April 13, 1982, that their claims for injunctive relief after October 1, 1981 were mooted by the amendment to 42 U.S.C. 602(a). (J.A. 150-151)

On January 22, 1982, the District Court denied Petitioners' motions for summary judgment and class certification and granted Respondent's motion to dismiss the action. (J.A. 36-44)

The Plaintiffs in *Banas* v. *Dempsey* and *MWRO* v. *Dempsey* filed a joint appeal to the Sixth Circuit Court of Appeals. On August 24, 1984, the Court of Appeals issued its decision, affirming the District Court's decisions in both *Banas* and *MWRO*. *Banas* v. *Dempsey*, 742 F.2d 277 (6th Cir., 1984). The Court of Appeals held that after October 1, 1981, the Plaintiffs' claims for prospective injunctive relief became moot and that the Eleventh Amendment to the United States Constitution barred the court from awarding any relief regarding the Defendant's pre-October 1, 1981 policies and procedures.

Petitioners filed a motion for rehearing *en banc* which was denied by the Court of Appeals on October 18, 1984.

On January 16, 1985, the Petitioners filed a Petition for Writ of Certiorari. The only question presented is whether the Eleventh Amendment bars an order for notice relief to remedy past violations of federal law when, as a result of a change in federal law, no injunctive relief is sought concerning the state's current application of federal law. The Petitioners make no claim that, after October 1, 1981, the Respondent has violated any federal or constitutional law either with respect to the Department's child care expense policies or stepparent income policy.

A Writ of Certiorari was granted by this Court on April 1, 1985.

SUMMARY OF ARGUMENT

In the absence of any final injunctive or declaratory relief prohibiting ongoing or future violations of federal law, the Eleventh Amendment bars retroactive declaratory and notice relief against a state official. The only relief not barred by the Eleventh Amendment is prospective injunctive relief and non-prospective relief which is merely ancillary to prospective

relief already ordered by the District Court. Because there was no final prospective injunctive or declaratory relief ordered in either of the instant cases, the relief sought by the Petitioners is not ancillary relief.

Because the notice relief sought by the Petitioners here is not ancillary to prospective injunctive relief, it did not constitute the type of relief approved by this Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979), as permissible under the Eleventh Amendment. In addition, the retroactive declaratory relief sought against the state officials would, in effect, constitute a liability against the state which would impermissibly impact upon the State treasury in conflict with the Eleventh Amendment, as interpreted in *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

Moreover, the relief sought also was inappropriate because there were no state administrative remedies available to any of the Petitioners or the proposed class members at the time they sought such relief. Pursuant to 45 C.F.R. 205.10(a)(5)(iii), all administrative remedies regarding disputed welfare claims must be requested within 90 days of the State agency's action denying benefits. Here, any allegedly illegal action ceased with the federal amendments to the Social Security Act, effective October 1, 1981. Summary judgment was not sought until more than 90 days after the statutory change. Petitioners never requested notice of judicial, as opposed to administrative, remedies and, in any case, no such remedies existed due to state law. Thus, the notice relief sought is both incorrect and pointless. Since no state or federal remedies exist, no case or controversy exists with respect to Petitioners' request for declaratory relief regarding the alleged past violations of federal law.

ARGUMENT

I.

WHERE, DUE TO CHANGE IN FEDERAL LAW, THERE IS NO ALLEGATION OF CURRENT VIOLATIONS, THE ELEVENTH AMENDMENT PROHIBITS NOTICE RELIEF AND DECLARATORY RELIEF REGARDING PRIOR POLICIES.

A. The Eleventh Amendment Prohibits Notice Relief Where No Prospective Injunctive Relief Is Possible.

The Petitioners concede that after the effective date of OBRA on October 1, 1981, they no longer had a claim that the Respondent was currently in violation of the Social Security Act or any other federal requirement, either with respect to the treatment of stepparent income or day care expenses. At the time the District Court dismissed the two lawsuits on June 22, 1982, no final declaratory judgment had been rendered regarding the legality of the Respondent's policies or practices prior to October 1, 1981. In *Banas* v. *Dempsey*, a preliminary injunction entered on June 29, 1981, was amended, through the stipulation of the parties, on October 21, 1981, making the order effective only to October 1, 1981. In any case, a preliminary injunction is not a final determination on the merits. See *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1980).

In *MWRO* v. *Dempsey*, and *Banas* v. *Dempsey*, the Petitioners sought, and were denied, a judgment declaring the Respondent's pre-October 1, 1981 policies regarding stepparent income and child care expenses to be in violation of the Social Security Act, and requiring the Respondent to notify AFDC recipients of the existence of administrative procedures where-

by they might have their eligibility for back benefits determined. The District Court held in both cases, and the Court of Appeals affirmed, that the Eleventh Amendment barred the issuance of such relief to a proposed class of plaintiffs where no prospective injunctive relief regarding any ongoing federal violation was ordered or available. Although the Petitioners acknowledged that, after October 1, 1981, because of the amendments to the Social Security Act, no prospective injunctive relief was appropriate in these cases, the Petitioners nevertheless contend that such injunctive relief is not constitutionally required before a federal court may order a state defendant to issue such a notice to a proposed (although uncertified) class of plaintiffs.

The Petitioners' argument is premised upon their incorrect interpretation of this Court's decision in *Quern* v. *Jordan*, 440 U.S. 332 (1979). In *Quern* v. *Jordan*, the director of the Illinois state welfare department sought reversal of a Court of Appeals ruling (*Jordan* v. *Trainor*, 563 F.2d 873 (7th Cir., 1977)), which held that, under the circumstances of that case, an order directing "state officials to send a mere explanatory notice to members of the plaintiff class advising them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits" did not violate the Eleventh Amendment restrictions on federal lawsuits brought against state officials by citizens of such state. 440 U.S. at 338.

The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

In *Hans* v. *Louisiana*, 134 U.S. 1 (1890), this Court held that the Eleventh Amendment barred suits brought by a citizen against his own state as well as against another state. The Eleventh Amendment prohibition has been applied regardless of whether the relief sought is legal or equitable in nature. See *Missouri* v. *Fiske*, 290 U.S. 18, 27 (1930), *Cory* v. *White*, 457 U.S. 85, 91 (1982). The Eleventh Amendment bars actions against a State, even though individual officials are nominal defendants. *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945). A limited exception to the prohibition was created in *Ex parte Young*, 209 U.S. 123 (1908), in which the Court held that the Eleventh Amendment did not bar a suit in federal court to enjoin a state official from enforcing an allegedly unconstitutional state statute. The *Young* case dealt only with prospective injunctive relief. As this Court recently emphasized in *Pennhurst State School and Hospital* v. *Halderman*, —— U.S. ——; 104 S. Ct. 900; 79 L. Ed. 2d 77, 80 (1984): "The theory of *Young* has not been provided an expansive interpretation." In interpreting *Ex parte Young*, *supra*, this court said in *Edelman* v. *Jordan*, 415 U.S. 651, 676 (1974), that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to *prospective* injunctive relief. . ." (Emphasis added). In *Milliken* v. *Bradley*, 433 U.S. 267, 287 (1977), the court also emphasized that the exception created in *Ex parte Young*, *supra*, pertained to "compliance *in the future* with a substantive federal-question determination. . ." (Emphasis in original). The court in *Milliken* characterized the *Young* exception as the "prospective-compliance exception" to the Eleventh Amendment. *Id.* at 289.

In *Hutto* v. *Finney*, 437 U.S. 678 (1978), this Court held that an order awarding attorneys' fees against a state official was not barred by the Eleventh Amendment because it was an order which was "'ancillary' to the prospective order enforcing federal law." *Id.* at 690. The Court analogized the attorneys' fee ordered in *Hutto* to a fine for civil contempt

and explained that the power to impose such a fine was "properly treated as ancillary to the federal court's power to impose injunctive relief." *Id.* at 691. The Court also explained that under the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 42 U.S.C. 1988, attorneys' fees could be imposed against the losing party as a part of "costs" and that such costs were not barred by the Eleventh Amendment because they were ancillary to prospective relief which the court would have already ordered. The Court explained:

> ". . .*only prospective relief can be successfully pursued by an individual in a suit against a State*. . . ." (Emphasis added) *Id.* at 695, n. 24.

Thus, in *Hutto*, this Court reiterated its interpretation of the Eleventh Amendment that only *prospective* injunctive relief can be ordered against a state official in a lawsuit brought by a citizen of the state and the Eleventh Amendment bars any other relief by the federal court unless it is *ancillary* or *incidental* to the prospective relief already ordered by the court.

In *Quern*, the Court reviewed the principles stated above and concluded that the notice approved by the Court of Appeals was not barred by the Eleventh Amendment because it was "ancillary to the prospective relief already ordered by the court." 440 U.S. 349. Contrary to their argument, *Quern* does not support the granting of the notice relief sought by the Petitioners in the cases now before this Court because, here, there was no prospective injunctive relief ordered by the District Court. Before any final determination on the merits was rendered by the District Court, the Petitioners' claims for prospective injunctive relief became moot through changes in federal law.

The Petitioners cite *Quern* erroneously for the proposition that notice relief and a declaratory judgment regarding the

legality of the State's past conduct constitute prospective injunctive relief. What this Court in fact held in *Quern* was that the modified notice contemplated by the Seventh Circuit was "*ancillary to*" the prospective relief already ordered by the court. Nowhere in *Quern* did this Court state that the notice relief itself was "prospective relief."

Next, the Petitioners argue that the notice relief they seek constitutes prospective injunctive relief because the amount of back benefits owed to a given AFDC recipient or applicant would be calculated in the future and any payment would be made in the future. Therefore, according to the Petitioners, the order would be enforced or implemented in the future. Every court order is enforced or implemented in the future. A purely monetary judgment for compensatory damages is implemented in the future. The injunctive order reversed by this Court in *Edelman* v. *Jordan, supra*, would have been implemented in the future in essentially the same manner as the Petitioners describe in their brief. The Petitioners' argument obliterates any sensible meaning to the prospective-retroactive distinction between permissible and impermissible relief in federal court against state officials under the Eleventh Amendment.

The Petitioners' argument that the relief they seek is analogous to the relief upheld in *Milliken* v. *Bradley*, 433 U.S. 267 (1977) is also without merit. The Petitioners argue that the remedy they seek in this case is no less "prospective" than the injunctive relief ordered against the State in *Milliken*. In *Milliken*, this Court found that the Detroit school system was *currently* unlawfully segregated and that such segregation was caused in part by the actions of the State. To cure the ongoing segregation, this Court approved an injunction which ordered the defendants to implement a remedial program consisting of in-service training for teachers and administrators, guidance and counseling programs, revised testing procedures, and a

remedial reading and communications skills program. 433 U.S. 267, 275-276. This Court held that the District Court had not violated the Eleventh Amendment by requiring the State to share in the cost of these remedial programs because the relief ordered would have a prospective effect only. It was intended to cure an ongoing constitutional violation by desegregating the school system for future (and possibly, current) black students. Obviously, the remedial order would not help those former students who had already left the school system. The remedial components were held to be necessary prospective relief because the Court considered that a pupil assignment plan alone would not automatically cure the ongoing deficiencies caused by a segregated school system. *Id.* at 287.

In this case, the intended purpose of the relief sought by Petitioners is the ultimate payment, out of the State treasury, of an accrued monetary liability; namely, the payment of certain welfare benefits allegedly wrongfully withheld up to (but not after) October 1, 1981. In *Milliken* v. *Bradley, supra,* at 290, n. 22, this Court stated:

> "In contrast to *Edelman*, there was no money award here in favor of respondent Bradley or any members of his class. *This case simply does not involve individual citizens' conducting a raid on the state treasury for an accrued monetary liability.* The order here is wholly prospective in the same manner that the decree mandates vocational schools and assignments, for example.

In summary, there is no reasonable way to interpret the relief sought by the Petitioners in these cases as prospective injunctive relief.

An analysis of the history of the *Quern* litigation supports the Respondent's position that the notice relief the Petitioners

are seeking is barred by the Eleventh Amendment.[1] *Quern* was originally filed in 1971 under the case name *Jordan* v. *Weaver*, No. 71-C-70 (N.D. Ill.). A class of plaintiffs sought declaratory and injunctive relief to require the Illinois welfare department to process applications for the Aid to the Aged, Blind and Disabled (AABD) program within time limits prescribed by federal regulations. In March 1972, the District Court found the defendant's practices to be in violation of the then existing Social Security Act and issued a permanent injunction ordering the defendant to comply in the future with the federal time limits. The court also ordered the state to pay retroactive benefits. The Seventh Circuit Court of Appeals affirmed this judgment. *Jordan* v. *Weaver*, 472 F.2d 985 (7th Cir., 1973).

The Petitioners assert that in *Jordan* v. *Weaver*, 71-C-70 (N.D. Ill., 1972), the District Court issued a declaratory judgment that state officials had violated federal law in the past and that this Court let such judgment stand in its opinion in *Edelman* v. *Jordan*, *supra*. Neither contention is correct. No declaratory judgment was issued by the District Court with respect to any alleged past violations. The only statement in the nature of declaratory judgment was set forth in paragraph 4 of the District Court's judgment (Appendix 2 to brief for the Petitioners) which states:

> "4. Illinois Categorical Assistance Manual, Section 4004, and Subsections thereunder, as applied to applicants for

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[1] A citation history of the *Quern* litigation is as follows: *Jordan* v. *Weaver*, No. 71-C-70 (N.D. Ill., March 1972) aff'd. 472 F.2d 985 (7th Cir. 1973), rev'd. in part, *sub nom. Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Jordan* v. *Trainor*, 405 F. Supp. 302 (N.D. Ill., 1975) (on remand); rev'd., 551 F.2d 152 (7th Cir. 1977); modified, *Jordan* v. *Trainor*, 563 F.2d 873 (7th Cir. 1977) (*en banc*); aff'd. *sub nom. Quern* v. *Jordan*, 440 U.S. 332 (1979).

AABD are invalid insofar as they are inconsistent with the requirements of paragraphs 1 and 2, supra."

Paragraphs 1 and 2 set forth the prospective injunctive relief ordered by the Court. Paragraph 4 clearly refers to the state's then current policy and makes no mention of the state's past actions. The District Court's only treatment of the state's past violations of federal law were covered in paragraph 5 of the judgment which "enjoined" the state officials "to release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968 and April 16, 1972, and were determined eligible. . ." It was this very retroactive injunctive relief that this Court declared violative of the Eleventh Amendment in *Edelman* v. *Jordan*, 415 U.S. 651, 678 (1974).

In *Edelman*, this Court reversed that portion of the decree which awarded retroactive benefits and remanded the case for further proceedings consistent with its opinion. On remand, the District Court ordered state officials to send to each class member a notice informing the client: "You were denied public assistance to which you were entitled in the amount of $____" along with a "Notice of Appeal" form to be signed and returned to the welfare department by the class member. *Jordan* v. *Trainor*, 405 F. Supp. 802 (N.D. Ill. 1975).

The Seventh Circuit Court of Appeals, sitting *en banc*, reversed, holding that the "notice" ordered by the District Court violated the Eleventh Amendment because it served, in effect, as an admission by the state that back benefits were due to the plaintiff class. *Jordan* v. *Trainor*, 563 F.2d 873 (7th Cir., 1977). The Seventh Circuit did, however, find that "a mere explanatory notice to applicants advising them that there was a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits" and the provision of "a simple returnable

notice of appeal form" would not violate the Eleventh Amendment in this particular case. It is clear that the Seventh Circuit approved such a modified notice as an ancillary aspect of the District Court's permanent prospective injunctive relief. To this effect, the Court of Appeals explained:

> "Only the retroactive award provision was struck down by the Supreme Court. The basic controversy did not disappear. *The notice problem we now face is a related aspect of the class controversy controlled by the trial court's permanent injunction.*" (Emphasis added) 563 F.2d 873, 875.

The Court of Appeals emphasized that even as relief ancillary to a permanent prospective injunction, the constitutionality of the "notice" relief is a close question:

> "This court is not in agreement on the constitutionality of such limited relief *as an adjunct to the purely prospective relief granted.* Although we view it as a close question, we hold that in the context of this case a permissible notice may be fashioned within the strictures of the Eleventh Amendment." (Emphasis added). *Id.* at 875.

In conclusion, the Court of Appeals reiterated that its suggested notice and the prospective permanent injunction were "all related and a part of the whole":

> ". . .The district court rightfully curtailed the continuing breach as to the future by permanent injunction. What is now controlled by the permanent injunction and the proposed modified notice are all related and part of the whole which affected the class. . . ." 563 F.2d 873, 878.

This Court in *Quern*, concurred in the reasoning of the Seventh Circuit and affirmed the Court of Appeals' decision.

This Court stressed that the notice relief suggested by the Seventh Circuit did not violate the Eleventh Amendment because it was ancillary to prospective relief already ordered by the trial court. Such a conclusion is consistent with the earlier Supreme Court decisions discussed, *supra*.

The conclusion that the notice relief is dependent upon the existence of properly ordered prospective injunctive relief is supported by this Court's characterization of such relief as "no more than '[the members of the plaintiff class] would have gathered by sitting in the courtroom or by reading and listening to news accounts had the case attracted any attention'." *Quern*, 440 U.S. at 336. What the class members would have gathered by "sitting in the courtroom" was that the District Court had permanently enjoined the state officials from committing future violations of the Social Security Act by failing to process AABD applications in a timely manner and that the lawsuit was now at an end. It is implicit in this Court's statement that *Quern*-type notice relief was never intended to be afforded independent of prospective relief. This Court emphasized this principle in *Quern*, *supra*, at 337 by stating:

> ". . .[A] federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even if such an injunction may have an ancillary effect on the state treasury. . . .*The distinction between the relief permissable under the doctrine of ex parte Young and that found barred in Edelman was the difference between prospective relief on one hand and retrospective relief on the other.*" (Emphasis added).

Again, quoting from *Edelman*, this Court in *Quern*, at 338 held: "A federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective

injunctive relief. . ." Finally, in conclusion, this Court said in *Quern*:

> "The notice approved by the Court of Appeals, unlike that ordered by the District Court, is more properly viewed as ancillary to the prospective relief already ordered by the court. See *Milliken* v *Bradley*, 443 US at 290. The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue . . ." 440 U.S. 332 at 349.

The above quoted language shows that this Court recognized that the disapproved District Court's notice could not properly be viewed as ancillary to prospective relief already ordered by the Court.

A comparison of the Court of Appeals notice which was approved in *Quern* and the District Court notice which was disapproved further illustrates the prospective/retroactive distinction made by the Court between what is and what is not permissible relief against a state official under the Eleventh Amendment. The District Court was ordering the state official to send a notice to each class member stating "You were denied public assistance to which you were entitled in the amount of $____" along with a notice of appeal form to be signed by the recipient stating "the Department illegally delayed in the processing of my AABD application, and, as a consequence, denied me benefits to which I was and am entitled." The District Court notice was the equivalent of a declaratory judgment regarding Illinois' alleged past violations of the Social Security Act. The effect of the District Court notice relief in *Quern* and the relief requested by Petitioners here would be the same.

They both constitute a federal court ruling on the legal merits on a claim regarding a past violation of federal law. Indeed, the relief sought by Petitioners in the instant cases falls even farther afoul of the Eleventh Amendment bar than does the District Court notice relief disapproved in *Quern*. In the *Quern* litigation, in contrast to the cases now before this Court, the District Court could tie its notice relief to the prospective injunctive relief ordered by the Court.

Contrary to the Petitioners' contention in their brief, this Court in *Quern* did not approve an order directing state officials to inform a class of plaintiffs "that their federal rights had been violated in the past." (Petitioners' brief, p. 7). In fact, it was just such an order that the Seventh Circuit Court of Appeals disapproved in *Jordan* v. *Trainor*, 563 F.2d 873 (7th Cir., 1977). This Court then affirmed the Seventh Circuit decision in *Quern*. In contrast, as noted above, the type of order which this Court approved in *Quern* says nothing about the validity of the state's past actions. It merely would inform class members that their federal suit was at an end, that the federal court could provide them no further relief, and that there were state administrative procedures which they may wish to pursue to determine whether they might be eligible for past benefits.

The Petitioners argue that the notice relief in *Quern* was not ancillary to prospective injunctive relief because, by the time the Seventh Circuit proposed the sort of notice relief which would be acceptable under the Eleventh Amendment, the AABD program had been terminated by Congress and, therefore, further enforcement of the prospective injunction was moot. It appears that the Petitioners are trying to argue that *Quern* does not require that notice relief must be ancillary to final prospective relief to be permissible under the Eleventh Amendment. However, merely because with the passage of time due to successive appeals and remand, no further prospective enforcement is necessary, it does not follow that notice

relief loses its character as relief which must be ancillary to final prospective relief. At the time the District Court issued its final judgment on the merits in 1971, the injunctive relief ordered was clearly prospective and involved in ongoing violation of then current federal law. As discussed throughout this brief, it is a critical difference between the relief approved by this Court in *Quern* and the relief sought by Petitioners that here there never was any permanent prospective injunctive relief ordered by the District Court.

B. Declaratory Relief Against State Officials Regarding The Legality Of State Policy Under A Prior Federal Statute Is Prohibited By The Eleventh Amendment.

After October 1, 1981, Petitioners had no claim regarding any ongoing violations of the Social Security Act. Petitioners, however, still claim entitlement to notice informing the proposed class that the Respondent's pre-October 1981 policies violated the Social Security Act and informing them of the existence of administrative remedies that may be available under state law. Such notice relief is dependent upon the existence of a declaratory judgment that the Respondent's pre-October 1, 1981 policies were in violation of federal law. Thus, if the underlying declaratory relief is barred, then necessarily, no notice relief can be considered.

It is uncontested that the Eleventh Amendment precluded the District Court from ordering the Respondent to pay back AFDC benefits to the Petitioners based upon the Respondent's allegedly erroneous interpretation of the pre-October 1, 1981 Social Security Act. See *Edelman* v. *Jordan*, *supra*. Since the federal court has no jurisdiction to remedy the alleged past statutory violation, a declaratory judgment is merely an advisory opinion, which the District Court would not have jurisdiction to issue.

This conclusion is mandated by Art. III, § 2, Cl. 1 of the United States Constitution which this Court has said means that the federal courts have no jurisdiction to determine any legal question brought before them where no actual case or controversy currently exists between the parties. "As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, not abstractions' are requisite." *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89 (1947).

The "case or controversy" requirement in Article III also prevents federal courts from considering questions which no longer represent an "actual controversy" between the parties. "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre* v. *United States*, 319 U.S. 41 (1943). In *North Carolina* v. *Rice*, 404 U.S. 244 (1971), this Court, citing numerous other Supreme Court decisions, reiterated the long established rule that the federal courts do not have jurisdiction over questions which do not affect the rights of the parties before them:

> ". . .Early in its history, this Court held that it had no power to issue advisory opinions. . .and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. . .To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. • • • *It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character,* as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' . . .However, '[m]oot questions require no answer.' . . .Mootness is a jurisdictional question because the Court 'is not em-

> powered to decide moot questions or abstract propositions,' . . .our impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" (Emphasis added.) 440 U.S. 244, 246

The "current case or controversy" requirement applies as well in actions where declaratory judgment is sought since 28 U.S.C. 2201, the statute authorizing declaratory relief, requires "a case of actual controversy." The statutory term has been held to be coterminous with the "case or controversy" requirement found in Art III, § 2 of the Constitution of the United States. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, (1937). Thus, in order for a federal court to entertain Petitioners' declaratory judgment claim against this Respondent, the complaint must set forth a live, actual controversy involving the Department of Social Services and not a moot, abstract or hypothetical dispute.

Since the federal court cannot award monetary relief for alleged past federal law violations and since there were no ongoing violations of federal law which would authorize prospective injunctive relief, there is no current controversy before the federal court. A claim that a state court or administrative tribunal may have jurisdiction to afford a remedy for a past violation is, at best, hypothetical, and does not create a current case or controversy before the federal court for a declaratory judgment on a prior statutory requirement. In any event, as discussed in Part II, *supra*, there is no relief which a state tribunal can afford in this case either.

Even assuming *arguendo* that the retroactive declaratory relief sought by the Petitioners is not barred by Article III, § 2 of the Constitution, it nonetheless is barred by the Eleventh Amendment.

The only purpose for seeking retroactive declaratory relief is ultimately to require the State to pay back welfare benefits to the purported class members. The Petitioners clearly intend that such an order would result in an impact on the State treasury. If the Petitioners are successful, the impact upon the State treasury obviously would be considerable.

The circumstances in the cases before this Court are materially different from the circumstances confronting the Court in *Quern*. The type of notice approved by the Court in *Quern* contained no ruling on the legality of the State's past actions. Consequently, notice relief there afforded the Petitioners no substantive rights beyond what had been declared through the previously issued prospective rulings of the District Court. The fact that the prospective ruling may be applied, via the doctrine of *res judicata* or collateral estoppel, to a subsequent state administrative proceeding regarding back benefits is not a function of the notice relief approved by this Court but is a function of the substantive prospective injunctive relief itself. The notice portion of the relief, however, was purely informational. In this regard, this Court, quoting with approval from the Seventh Circuit decision, said:

> "'The form of notice we envision would not create a "liability" against the state. Whether a liability might result would be a matter for state determination, not the federal court. No federal judgment against the state would be created. . . .'." 440 U.S. 332 at 336.

In contrast, the retroactive declaratory relief requested by the Petitioners here would be an actual determination on the merits of the State's past conduct which is in no way tied to any ruling on the legality of the Respondent's current or future conduct. It is clearly "a federal judgment against the state." In the absence of any applicable affirmative defenses to the invocation of state remedies, the declaratory judgment sought

by the Petitioners would bar or collaterally estop the Respondent from litigating the legal merits of a would-be class member's claim in the State proceedings. See *DePolo* v. *Greig*, 338 Mich 703; 62 N.W. 2d 441 (1954), *Curry* v. *Detroit*, 394 Mich. 327, 331; 231 N.W. 2d 57 (1975). Hence, the link between the relief sought by the Petitioners here and an impermissible impact upon the State treasury is much stronger than in *Quern*, where the "notice" relief added nothing substantive to the *prospective* injunctive relief ordered by the District Court.

C. The Cases Upon Which Petitioners Rely Do Not Support Their Claim For Declaratory Judgment Regarding An Alleged Past Statutory Violation Or Notice Relief.

Not only is the Sixth Circuit's decision, below, in *Banas* v. *Dempsey*, *supra*, supported by the Seventh Circuit's decision in *Jordan* v. *Trainor*, *supra*, it is also supported by the Second Circuit's decision in *Colbeth* v. *O'Rourke*, 707 F.2d 57 (2nd Cir., 1983), *aff'g. Colbeth* v. *Wilson*, 554 F. Supp. 539 (D. Vt., 1982), which involved circumstances indistinguishable from the facts before this Court in the instant case. The plaintiffs there filed a class action suit against Vermont state officials, challenging the state's implementation of federal food stamp requirements. Before final adjudication on the merits, the federal law changed with respect to the challenged policies and mooted out the plaintiffs' claim for prospective injunctive relief. The plaintiffs, nonetheless, claimed that they were entitled to the same type of notice and declaratory relief regarding the pre-amendment policy that the Petitioners are seeking here.

In rejecting any entitlement to notice relief, as did the Sixth Circuit in *Banas*, the District Court in *Colbeth* recognized that in the absence of prospective injunctive relief *Quern* created no independent basis for notice relief. The Court said:

> ". . .the exception to the Eleventh Amendment created by *Quern* is a narrow one. The *Quern* plaintiffs were accorded prospective relief, and the retroactive remedy, comprised of the notice, was incidental to that prospective remedy. *Quern* cannot be construed to establish an independent basis for retroactive relief where prospective relief is not also forthcoming. . . ." 554 F. Supp. 539, 546.

The District Court in *Colbeth* pointed out that, where the "saving element of prospective relief" was absent, *Quern*-type notice would undermine the purpose of the Eleventh Amendment. The court explained that under these circumstances, such relief would facilitate indirectly what federal courts could not do directly under the proscriptions of the Eleventh Amendment. The court also addressed separately whether a declaratory judgment as to the legality of the state's pre-amendment conduct would violate the Eleventh Amendment. The court in *Colbeth* recognized that the effect of such declaratory judgment would be an "end run" around the Eleventh Amendment because, in all probability, the declaratory judgment would be *res judicata* in state court:

> ". . .By obtaining declaratory relief in this court, plaintiff seeks to eliminate the time-consuming and expensive necessity of rearguing the merits of the controversy, because a declaratory judgment would probably be *res judicata* in state court. There is no authority directly addressing the situation before us, but we believe that such a result effects an impermissible 'end run' around the Eleventh Amendment bar and we therefore deny the request for declaratory relief." 554 F. Supp. 539, 547.

The District Court pointed out that even if such a declaratory judgment would not be *res judicata*, it would serve no useful purpose and, therefore, would be inappropriate for that reason as well. 554 F. Supp. 539, 547, n. 2. In affirming the District

Court, the Second Circuit in *Colbeth* v. *O'Rourke*, *supra*, adopted the reasoning of the District Court in its entirety.

In *Dandridge* v. *Coler*, No. 84C930 (N.D. Ill., 1985), another District Court also held that, where prospective injunctive relief has become moot through a change in law, neither notice nor declaratory relief can be ordered with respect to any pre-amendment legal challenge that does not continue after the change in law. See Slip Opinion in the Appendix accompanying this Brief. The court distinguished the case of *Simpson* v. *Miller*, 93 F.R.D. 540 (N.D. Ill., 1982), which was decided by the same court and which is relied upon by the Petitioners in this case, since in *Simpson* the challenged state policy was found to be in violation of both the old *and* the new law. Slip. Op. at 5.

All of the other lower court cases cited by the Petitioners are distinguishable from the instant case as well. In *Silva* v. *Vowell*, 621 F.2d 640 (5th Cir., 1980), the Plaintiffs filed a class action law suit claiming that Texas' AFDC eligibility policy regarding incapacitated parents violated the Social Security Act. After the law suit was filed, the Defendants revised their policy "as a result of [the] class action" and not as a result of any law change. *Id.* at 644. The court held that the Eleventh Amendment did not bar notice relief with respect to the past illegal action which the state officials had voluntarily ceased after the law suit was filed. As this Court has recognized, voluntary cessation of illegal conduct does not usually render the alleged violation moot. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). In addition, the *only* challenge raised by the Defendants in *Silva* to the issuance of notice relief was the cost of sending the notice. This is not the basis on which the Respondents rely in challenging the constitutionality of *Quern*-type notice here.

Appleyard v. *Wallace*, 754 F.2d 955 (11th Cir., 1985) also was a case in which the State defendants voluntarily changed a challenged welfare policy after a law suit was filed claiming such policy violated federal law. Plaintiffs sought *Quern*-type notice with respect to the old policy, and the only defense to such notice raised by the State officials was that *Quern*-type notice was not available because class certification had been denied. In holding that class certification was wrongly denied, the Court of Appeals disposed of the only defense raised by the State.

In passing, however, the court in *Appleyard* noted another "interesting issue" which was first raised only at oral argument; namely, "[w]hat is the meaning of the Supreme Court's statement in *Quern* that the notice relief 'is more properly viewed as ancillary to the prospective relief already ordered by the court'." *Id.* at 961. The Court went on to decide the question without the benefit of briefs by either party. *Id.* n. 6. The Court recognized that *Quern* v. *Jordan* "could. . .be interpreted as requiring that some actual injunctive, declarative, or other prospective relief, aside from the notice itself, together with the concomitant determination that the defendants acted illegally, precede an award of notice relief." *Id.* at 961-962. The Court concluded, however, based upon its incorrect interpretation of *Milliken* v. *Bradley, supra*, and "subsequent case law," that the Supreme Court "did not intend such a result." *Id.* at 962. The only "subsequent case law" relied upon was the Fifth Circuit decision in *Silva* v. *Vowell, supra*, which the court stated was binding precedent unless and until overruled by the Eleventh Circuit sitting *en banc*. *Id.* at 962, n. 7.

Beltran v. *Myers*, 701 F.2d 91 (9th Cir., 1981); *cert. den., sub nom. Rank* v. *Beltran*, —— U.S. ——; 103 S. Ct. 3115 (1983), is also not persuasive precedent. In *Beltran* v. *Myers*, 451 U.S. 625 (1981), the Supreme Court considered a decision

of the Ninth Circuit upholding the validity under federal law of California's interpretation of a Medicaid requirement. Because of an imminent change in federal law, a majority of this Court vacated the judgment and remanded the case for consideration of the "validity of the California law under the *new* federal law." 451 U.S. 625 at 628 (emphasis added). The majority also expressed doubt as to whether, given the change in law, it was appropriate to decide the merits of the legality of the old statute. ("This raises the question whether it is appropriate for the Court to decide the merits of the underlying dispute as considered by the Court of Appeals.") *Id.* at 628.

On remand, the District Court ignored the directive of the majority of this Court and held only that California's Medicaid policies violated former federal Medicaid requirements and ordered *Quern*-type notice relief against the State. On appeal, the Court of Appeals, without explanation, determined that a *Quern*-type notice was appropriate. The only defense raised by California was the cost and administrative burden of sending such notice. Since the Respondent's argument here is not based upon the cost or administrative burden of sending the *Quern*-type notice to prospective class members, the decision in *Beltran* has little bearing on the cases before this Court. *Beltran* is also unpersuasive given the lack of analysis of *Quern* and other pertinent Eleventh Amendment decisions of this Court.

In *Randall* v. *Lukhard*, 709 F.2d 257 (4th Cir., 1984), a Court of Appeals panel held that a Virginia Medicaid policy violated federal law both before *and* after a Congressional amendment to the Social Security Act, effective July 1, 1981. The panel then went on to approve, with modification, the District Court order including *Quern*-type notice relief *"as part of an order that also included prospective injunctive relief."* 709 F.2d 257, 269 (Emphasis added).

On rehearing *en banc*, *Randall* v. *Lukhard*, 729 F.2d 966 (4th Cir., 1984), the Court of Appeals reversed the three-judge panel's determination that Virginia's policy violated the post-July 1, 1981 Social Security Act. The *en banc* decision was limited to a discussion of the merits of the claimed prospective violation of federal law. As to the other aspects of the panel's decision, the Court of Appeals *en banc* decision adopted the reasoning expressed by the panel majority. *Id. at* 967. Thus, the *en banc* decision contains not a word regarding *Quern* or any Eleventh Amendment issues affecting the propriety of notice relief. It appears that the *en banc* decision, therefore, overlooked the effect that its reversal of the finding of a prospective federal violation had on ancillary notice relief. This is particularly apparent since the *en banc* decision specifically ratified the three-judge panel's reasoning regarding notice relief, which did recognize the requirement that such notice relief must be ancillary to prospective injunctive relief.

To the extent that any of the foregoing cases relied upon by the Petitioners can be interpreted more broadly than discussed above, the Respondent urges that this Court reject such conclusions as inconsistent with the requirements of the Eleventh Amendment, as reflected by this Court in its previous decisions, and in the lower court decisions in *Banas, supra, Colbeth, supra, Jordan* v. *Trainor, supra,* and *Dandridge, supra.*

II.

NO HEARING REMEDIES WERE AVAILABLE TO THE PETITIONERS OR ANY MEMBERS OF THEIR PURPORTED CLASS AFTER DECEMBER 31, 1981.

As discussed *supra,* the Petitioners do not challenge the legality of any of the Respondent's AFDC eligibility determinations after October 1, 1981, the effective date of the OBRA Amendments to the Social Security Act. Federal regu-

lations controlling the State's administration of the AFDC program *mandate* that no request for an administrative hearing protesting a departmental action can be granted more than 90 days after the challenged action has occurred. As of December 31, 1981, 90 days after the effective date of the OBRA amendments, the foregoing regulations precluded all Petitioners and all members of Petitioners' proposed, but uncertified, class from beginning to pursue any state administrative remedy, as a matter of federal law. The Petitioners' Motions for Summary Judgment were not decided until June 22, 1982, more than 90 days after any allegedly illegal action would have been taken against any of the Petitioners. Thus, the notice relief sought by the Petitioners, informing would-be class members "that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits," would be in conflict with the federal regulations quoted above.

This Court in *Quern* did not address the question of conflict between federal AFDC requirements and notice relief. The Court did address (440 U.S. at 348, n. 20) respondent's concern that, if the State awarded retroactive relief, the federal government might not provide reimbursement for its share of the payments. However, the issue was not addressed by the Court as one involving a conflict between the relief proposed and mandatory federal requirements.

The Petitioners state in passing that they may have other independent remedies in state court (Petitioners' brief, p. 45, n. 10). However, the Petitioners in the litigation below limited their request for notice relief to notice of available *administrative* procedures. (See J.A. 14, *Banas*, R. 28, *MWRO*, R. 33A) Thus, the issue of whether or not any state court remedies can still be pursued is not before this Court for review.

Assuming *arguendo* that the propriety of a notice regarding availability of state judicial (as opposed to administrative) remedies is properly before this Court for review, such proposed relief is also not available as a matter of state law.

Petitioners suggest that M.C.L.A. 400.37; M.S.A. 16.437, provides an alternative judicial remedy in state court. That statute is merely a state enactment of the federal regulations regarding administrative hearing requirements and the right to judicial review of the hearing decision thereafter. In this regard, in addition to 45 C.F.R. 205.10(a)(5)(iii), 45 C.F.R. 205.10(a)(17) provides:

> "(17) The claimant shall be notified of the decision in writing and, to the extent it is available to him, of his right to appeal to State agency hearing or judicial review."

Since administrative hearings must be requested within 90 days of the Department's challenged action concerning the assistance grant level, and since, pursuant to 45 C.F.R. 205.10(a)(16), the administrative action must be completed within 90 days of the hearing request, and since, pursuant to M.C.L. 400.37; M.S.A. 16.437, any adverse hearing decision must be appealed to State Circuit Court within 30 days thereafter, an appeal to Circuit Court would also no longer have been available to any Petitioner at the time the District Court decided the Petitioners' Motions for Summary Judgment on June 22, 1982, almost 9 months after the Petitioners' claims for prospective injunctive relief became moot.

In addition, notice to class members of a right to appeal an adverse administrative decision to State Circuit Court would be unnecessary because such notice is already given pursuant to 45 C.F.R. 205.10(a)(17), quoted above. See also J.A. 92.

In any event, the relief Petitioners seek would now be barred by the three year statute of limitations for actions against the State in the Court of Claims, pursuant to M.C.L. 600.6452; M.S.A. 27A.6452. For purposes of an action under 42 U.S.C. § 1983, the applicable period of limitations is three years as specified in the general statute of limitations for injuries to persons or property. M.C.L. 600.5805(8); M.S.A. 27A.5805(8). *Wilson* v. *Garcia*, 471 U.S. ——, 85 L.Ed.2d 254 (1985).

Petitioners cannot argue that any statute of limitations on any state remedies has been tolled while they are litigating their § 1983 actions in federal court. The case of *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980) is controlling on this question. In that case, this Court explained that

> "Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal courts under § 1983 — a void which is commonplace in federal statutory law. When such a void occurs, this Court has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action."[2] 446 U.S. 478, 483

The Court explained that "this 'borrowing' logically included rules of tolling." The Court then went on to analyze whether, under New York law, the filing of one cause of action tolled the statute of limitation for another related, but independent cause of action. The Supreme Court found no such tolling provision in New York law. To this effect, the Court said:

> "No section of law provides, however, that the time for filing a cause of action is tolled during the period in

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[2]

In *Wilson* v. *Garcia*, *supra*, the Court said that the appropriate statute to be "borrowed" was the state's statute of limitations on an action for injuries to persons.

> which a litigant pursues the related, but independent cause of action. If a plaintiff wishes to pursue his claims in succession, rather than concurrently, the legislature has required plaintiff to either obtain a judicial stay of the time for commencing an action, or to litigate at risk." 446 U.S. 478, 486-487.

The Court then found that the respondent's § 1983 action was "separate and independent" from state administrative and judicial review remedies. To this effect, the Court said:

> "As in those cases, there is no question that respondent's 1983 action was 'separate and independent' from the state judicial remedy pursued in state court. This Court has not interpreted § 1983 to require a litigant to pursue state judicial remedies prior to commencing an action under this section. In *Monroe* v. *Pape*, 365 U.S., at 183, we held: 'It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' Thus the very independence of § 1983, reveals that the New York rule precluding tolling in the circumstances of this case is not 'inconsistent' with the provisions of § 1983." 446 U.S. 478, 491 (footnote omitted).

As in the *Tomanio* case, Michigan also has no tolling statute which would apply in this case. See *Buscaino* v. *Rhodes*, 385 Mich. 474; 189 N.W.2d 202 (1971) and *Stewart* v. *Michigan Bell Tel. Co.*, 39 Mich. App. 360; 197 N.W.2d 465 (1972), which discussed the limited scope of Michigan's tolling statutes. Thus, for the reasons stated in *Board of Regents* v. *Tomanio, supra*, the limitation period for Plaintiffs' state administrative remedies were not tolled by the filing of this § 1983 action.

The Fourth Circuit Court of Appeals panel in *Randall* v. *Lukhard*, *supra*, also recognized that the propriety of *Quern*-type notice was dependent upon the existence of available state-established remedies. *Id.* at 270. It found that, although Virginia required that hearing requests be made within 30 days of the welfare department's action, Virginia had adopted a rule whereby the 30-day limit could be excused for good cause shown. The Michigan Department of Social Services has no such exception to its 90-day limitation on hearing requests. In any case, any extension beyond 90 days would be prohibited by 45 C.F.R. 205.10(a)(5)(iii) which is a federal mandatory time limitation on hearing requests. The court also found that Virginia's three-year statute of limitations on pecuniary claims against the State in state court had not yet run. *Id.* at 270. As established *supra*, the statute of limitations for such action in Michigan has run. In addition, in contrast to the cases at bar, no question of the State's immunity in state court was raised.

On p. 25 of their brief, Petitioners erroneously argue that, pursuant to 42 U.S.C. 602(a)(22), regardless of any federal limitation on administrative hearing remedies, a State *must* pay retroactive welfare benefits to recipients if a federal court makes a declaratory ruling that the State's past practices violated past federal AFDC requirements. 42 U.S.C. 602(a)(22) provides in pertinent part:

> "(a) A state plan for aid and services to needy families with children must
>
> • • •
>
> (22) provide that the state agency will promptly take all necessary steps to correct any overpayment or underpayment of aid under the State's plan. . ."

Federal regulations define an underpayment as follows:

". . .Underpayment means a financial assistance payment received by or for an assistance unit for the payment month which is less than the amount for which the assistance unit was eligible, or failure by the State to issue a financial assistance payment for the payment month to an eligible assistance unit if such payment should have been issued. . . ." 45 CFR 233.20(a)(13)(ii)

As defined above, an underpayment is an AFDC payment which is less than the amount for which the recipient was eligible or a failure to make an AFDC payment for which the recipient was eligible. However, the State has never agreed that any of the Petitioners were eligible, prior to October 1, 1981, for any greater AFDC benefits than they received. Unless and until a recipient's eligibility for any back benefits has been established, no underpayment exists, as that term is defined in the federal regulations. Under federal regulations, where eligibility is disputed, as it is in these cases, the recipient must make a timely request for a hearing to have the disputed eligibility determined.

Contrary to the implication in Petitioners' brief, 42 U.S.C. 602(a)(22) does not require the Respondent to grant hearings to recipients regardless of whether or not they had requested administrative hearings within the 90-day limit set forth in 45 C.F.R. 205.10(a)(5)(iii). 42 U.S.C. 602(a)(22) is merely a provision which states that if an underpayment of assistance is established, the State must promptly correct such underpayment. The provision, however, does not specify or control the conditions under which the State must conduct a hearing to determine if an underpayment has occurred.

Petitioners' interpretation of 42 U.S.C. 602(a)(22) renders the 90-day hearing request limitation in 45 C.F.R. 205.10(a)(5)(iii) utterly meaningless. Every recipient who wishes to challenge a Departmental action concerning his assistance

grant is, in effect, claiming that there has been an underpayment of assistance. Under the Petitioners' argument, so long as any claimant asserts that he was entitled to more benefits than he received, he could demand a hearing at any time. Obviously, such results were not contemplated under 45 C.F.R. 205.10(a)(5)(iii) or 45 C.F.R. 233.20(a)(13), the regulation implementing 42 U.S.C. 602(a)(22). The only reasonable interpretation of 42 U.S.C. 602(a)(22) and the regulations thereunder is that after the Department of Social Services has determined that there has been an underpayment, it cannot delay in correcting such underpayment.

The foregoing conclusion is supported by 45 C.F.R. 205.10 (a)(18) which provides:

> "*When* the hearing decision is favorable to the claimant, or *when* the agency decides in favor of the claimant prior to the hearing, the agency shall promptly make corrective payments retroactively to the date the incorrect action was taken." (Emphasis aded.)

Thus, if there has been no hearing determination and if the Department does not, *sua sponte*, determine that it has made an underpayment, 42 U.S.C. 602(a)(22) is inapplicable. As discussed above, in the cases at bar, no administrative hearing remedy is available and the Department continues to believe that its policies did not violate the Social Security Act prior to October 1, 1981.

Assuming *arguendo* that the Plaintiffs' interpretation of 42 U.S.C. 602(a)(22) is correct, then the relief requested by the Plaintiffs would be an even more blatant violation of the Eleventh Amendment. Under Plaintiff's interpretation of 42 U.S.C. 602(a)(22), a declaratory judgment stating that the Respondent's past actions denied Petitioners public assistance benefits in violation of the Social Security Act would result,

with certainty, in a monetary liability against the State treasury, since the State would be stripped of all legal and procedural defenses against the Petitioners' claims.

The Petitioners state that 45 C.F.R. 205.10(a)(3) requires "state officials to provide notice of the recipient's right to a hearing 'at the time of any action affecting his claim'." (Petitioners' Brief at 23) The Petitioners imply that "any action" would include action by a federal court granting declaratory judgment regarding an alleged past violation of the Social Security Act. The Petitioners also imply that "claim" refers to a "claim" made by recipients in such federal law suit. Thus, the Petitioners imply that 45 C.F.R. 205.10(a)(3) affords them a right to an administrative hearing at any time a federal court renders a final decision in their favor. However, it is clear, upon considering 45 C.F.R. 205.10(a)(3) in context with other pertinent sections of the regulations, including 45 C.F.R. 205.10(a)(4) and 205.10(a)(5), that "actions" refers to actions of the state department affecting eligibility, and that "claim" refers to the recipient's claim to the State agency for financial assistance. Thus, 45 C.F.R. 205.10(a)(3) merely requires that when the *Department* takes any *action* affecting the client's claim for financial assistance, it must inform the client of his right to request a hearing, if the action resulted in a denial, suspension, reduction, discontinuation, or termination of public assistance to which he thinks he is entitled (so long as such hearing request is made within 90 days of the Department's action).

In summary, 45 C.F.R. 205.10(a)(3) has nothing to do with any recipient's right to notification regarding action taken by a federal court.

In conclusion, regardless of the merits of Petitioners' Eleventh Amendment Argument, no state remedies are avail-

able to them, as a matter of law and, therefore, the relief they seek is inappropriate on this basis, alone.

CONCLUSION

For the reasons stated above, the decision of the Sixth Circuit Court of Appeals should be affirmed.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA DANDRIDGE, etc., Plaintiff, v. GREGORY COLER, Director, et al., Defendants.	NO. 84 C 930

MEMORANDUM OPINION

This case involves a suit by representatives of a class of MANG(AFDC) applicants and recipients, challenging the eligibility standards used by the State of Illinois in its Medicaid program for the medically needy. Plaintiffs seek a declaratory judgment that the use of different income eligibility standards for MANG(AFDC) and MANG(AABD) benefits violates federal law, and had requested a permanent injunction against further use of those standards.

On October 11, 1984, this court issued an opinion denying plaintiffs' motion for summary judgment, granting defendants' motion for same, and dismissing the case. In that opinion, we held that because the State of Illinois had elected the § 209(b) option under the Supplemental Security Income Act for the Aged, Blind and Disabled, 42 U.S.C. § 1396(a)(f), eligibility standards for MANG(AFDC) and MANG(AABD) recipients in Illinois are not required to conform to the "identical standard" and "comparability" requirements of other portions of the Act. *Dandridge v. Coler*, No. 84 C 930, slip op. at 7-8 (N.D. Ill. Oct. 11, 1984) (Grady, J.). Plaintiffs had also argued that the Illinois standards did not comply with the dictates of § 209(b) itself. Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment, at 1-2.

We did not decide this second issue because we felt the plaintiff class of MANG(AFDC) applicants and recipients did not have standing to challenge standards related only to the MANG(AABD) program. *Dandridge v. Coler,* slip op. at 8 n. 9. Following our opinion, plaintiffs filed a motion to alter or amend that judgment pursuant to Fed. R. Civ. P. 59(e) on the basis that our standing analysis mischaracterized the nature of the relief plaintiffs seek.

We are inclined to agree with plaintiffs that our prior decision dismissing their second argument for lack of standing was in error. Plaintiffs' motion to alter or amend must be denied, however, as this court is precluded by the Eleventh Amendment from further consideration of this case.

On January 1, 1985, a new state law directed at the same inequities challenged in this lawsuit took effect. Public Act 83-1450 amends the Illinois Public Aid Code and mandates the use of a uniform eligibility standard for MANG benefits using the maximum income standard allowed under Title XIX of the federal Social Security Act. P.A. 83-1450 (House Bill No. 1522), 83rd General Assembly, 7 1984 Ill. Legis. Serv. 47 (West); *see also* Ill. Rev. Stat. ch. 23, § 5-2. This statutory change prohibits the Illinois Department of Public Aid from applying different eligibility standards for MANG(AFDC) and MANG(AABD) recipients. Defendants have submitted the policy changes enacted by the Department of Public Aid in conformance with the new law, and plaintiffs agree that their claim for an injunction preventing the application of different standards is now moot. Defendants' Amended Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend, Exhibit B; Plaintiffs' Reply Memorandum, at 1.

If this suit involved private defendants, plaintiffs would still have a live, justiciable claim for money damages, and the case as a whole would not be mooted by the statutory change.

See Simpson v. Miller, 93 F.R.D. 540, 543, n. 4 (N.D. Ill. 1982). It is well settled, however, that the Eleventh Amendment[1] precludes suits for money damages which must be paid from public funds in a state treasury unless a state has consented to such suits. *See Kennecott Copper Corp v. State Tax Commission*, 327 *U.S.* 573 (1946). Where a state has not consented, state officials may still be sued to enjoin state actions which violate federal law, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908),[2] although such actions are limited to claims for prospective injunction relief. Retroactive relief to remedy past violations is barred by the Eleventh Amendment, as such relief "resembles far more closely the monetary award against the State itself ... than it does the prospective injunctive relief awarded in *Ex parte Young*." *Edelman v. Jordan*, 415 U.S. 651, 665 (1974) (citation omitted).

Plaintiffs recognize that retroactive relief is not available, however, they argue that they are still entitled to "notice relief" under *Quern v. Jordan*, 440 U.S. 332 (1979), and that this claim for notice relief saves the suit from being found completely moot. The Supreme Court in *Quern* held that although

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[1]

The Eleventh Amendment reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. *See* Hans v. Louisiana, 134 U.S. 1 (1890), for the Court's ruling that the Eleventh Amendment also bars suits brought against an unconsenting State by its own citizens.

[2]

In *Ex parte Young*, a federal court prohibited the Attorney General of Minnesota from bringing suit to enforce a state statute that violated the Fourteenth Amendment. The Court held that the Eleventh Amendment did not prohibit this injunction because the unconstitutional state statute was "void" and therefore did not "impart to the state official any immunity from responsibility to the supreme authority of the United States." *Young*, 209 U.S. at 160.

a federal court could not order state officials to award back benefits to individuals previously denied public assistance under a policy enjoined by the court, the state defendants could be ordered to send out an explanatory notice informing members of the plaintiff class that the federal suit had concluded and there were state administrative procedures in existence which they might wish to pursue. *Id.* at 349. Although the notice might ultimately result in the issuance of back benefits to those individuals who took advantage of the state administrative procedures, the Court held that this was not the type of retroactive relief barred by the Eleventh Amendment, because the chain of causation from the notice to the award of benefits contained "numerous missing links, which can be supplied, if at all, only by the State and members of the plaintiff class, not by a federal court." *Id.* at 347. The Court reasoned that:

> Whether a recipient of notice decides to take advantage of those available state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court.

Id., at 328. The notice approved in *Quern* was viewed by the Court as "ancillary to the prospective relief already ordered by the court." *Id.*, at 349.

Plaintiffs in this case seek a declaratory judgment as to the legality of the state's former MANG eligibility determination policy and *Quern* notice relief ancillary to that judgment. They argue that these claims are to remedy the denial of benefits to the plaintiff class prior to January 1, 1985, and that so long as plaintiffs are not notified of a "state damage remedy," they are suffering a continuing injury unaffected by the recent change

in Illinois law. A claim for declaratory judgment alone is insufficient to keep an otherwise moot case live, *Ashcroft* v. *Mattis*, 431 U.S. 171 (1977); however, plaintiffs argue that their request for *Quern* notice relief is a "present right" which is still at stake. Plaintiffs' Reply Memorandum, at 5; *Ashcroft*, 431 U.S. at 172 (where no "present right" is at stake, there is no live "case or controversy").

In support of their argument, plaintiffs point to the court's decision in *Simpson* v. *Miller*, *supra*. In *Simpson*, the federal law governing the deduction of work-related child care expenses in calculating the amount of AFDC benefits to be awarded was changed during the course of a lawsuit challenging the State of Illinois' policy regarding such deductions. The court held that the claims of the plaintiff class members who were denied the full amount of their benefits prior to the federal law change were not moot, since "[p]laintiffs continue to be denied the full amount of benefits they claim they were entitled to, and the putative class still has not been notified that it has a state damage remedy. As long as the defendants do not notify the putative class of their asserted remedy, plaintiff's claim of a 'present right' to notice relief . . . remains live." *Simpson* v. *Miller*, *supra*, 93 F.R.D., at 343 (citation omitted). We note, however, that although the federal law in *Simpson* was amended, the challenged state policy itself was never changed, and that policy was ultimately found by the court to be in violation of both the old and the new federal law. *Simpson* v. *Miller*, 535 F.Supp. 1041 (N.D. Ill. 1982). The *Quern* notice relief requested in *Simpson* was there ancillary to the prospective relief issued when the court enjoined the state's policy as violative of both versions of the federal law. *Id.*

A Michigan policy similar to the one at issue in *Simpson* v. *Miller* was challenged in *Banas* v. *Dempsey*, 742 F.2d 277 (6th Cir. 1984). The *Banas* suit was also initiated prior to the changes in federal law governing the deduction of work-

related child care expenses. The Michigan state defendants, however, implemented new policies consistent with the new federal law on the date the federal law took effect. *Id.*, at 279. The Sixth Circuit Court of Appeals held that since the plaintiffs' primary claim for relief, an injunction against the former policy as violative of federal law, was mooted by both the change in federal law and change in state policy, the federal court was barred by the Eleventh Amendment from awarding *Quern* notice relief. "To escape the bar of the Eleventh Amendment, an order against state officials must be both 'prospective' *and* ancillary to a *Young* injunction ordering state officials to comply with federal law—the 'prospective-compliance exception.'" *Id.*, at 288. *Quern* notice relief, therefore, is not a right in and of itself separate from prospective relief, and since the claim in *Banas* for a prospective injunction was moot, the claim for *Quern* notice was barred by the Eleventh Amendment. *See also Colbeth v. Wilson*, 554 F. Supp. 539 (D.Vt. 1982), *aff'd sub. nom., Colbeth v. O'Rourke*, 707 F.2d 57 (2d Cir. 1983).

Because defendants in this case have changed their policy and therefore mooted all claims for prospective relief, we believe this case is more analogous to *Banas* than *Simpson*. Plaintiffs agree that defendants' current policy does not violate federal law, and we believe that in order to avoid the bar of the Eleventh Amendment, *Quern* notice relief must be ancillary to something more than a declaratory judgment governing past official conduct. For us to now decide that the former state policy was unlawful and award relief on that basis "would facilitate indirectly what this court cannot do directly under the proscriptions of the Eleventh Amendment." *Colbeth v. Wilson, supra*, 554 F. Supp. at 547. We therefore hold that plaintiffs' prospective injunctive relief claim is now moot, and that we are barred by the Eleventh Amendment from deciding any remaining retroactive claims plaintiffs may have. *See Pennhurst State School & Hospital v. Halderman*, —— U.S. ——,

104 S.Ct. 900 918 (1984) ('The Eleventh Amendment is an explicit limitation on the judicial power of the United States.' *Missouri v. Fiske*, 290 U.S., a 25. It deprives a federal court of power to decide certain claims against States that otherwise would be within the scope of Art. III's grant of jurisdiction.").[3]

In light of our finding that this case is now moot, plaintiffs request that we vacate our opinion and judgment order of October 11, 1984, in accordance with the doctrine of *United States v. Munsingwear*, 340 U.S. 36 (1950). Under *Munsingwear*, a judgment in a case which has become moot pending appeal must be vacated and the case dismissed. "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure

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[3]

Plaintiffs also argue that this case is not moot despite the enactment of Public Act 83-1450, because the change in defendants' policy was a voluntary cessation of allegedly illegal acts. Mere voluntary discontinuance of challenged conduct is not sufficient to moot a case where defendants will then be free to return to their old ways. *See* City of Mesquite v. Aladdin's Castle, *Inc.*, 455 U.S. 283 (1982); Quern v. Mandley, 436 U.S. 725 (1978); *see also* Charles v. Daley, No. 83-3175, slip op. at 9-10 (7th Cir. November 30, 1984) (court of appeals holds that suit to enjoin the enforcement of portions of the Illinois Abortion Law is not moot even though that law has since been revised). We do not think that defendants' conduct here warrants a finding that defendants will return to the old MANG eligibility standards when this case is dismissed. Unlike the city ordinance challenged in *City of Mesquite*, the new state law was not enacted solely to avoid the consequences of this lawsuit; this is especially true since our prior opinion in this case upheld the validity of defendants' policy. *See* Commodity Futures Trading Commission v. Board of Trade, 701 F.2d 653, 655-56 (7th Cir. 1983). While it is certainly possible that P.A. 83-1450 may be repealed, leaving the state free to reinstate its former eligibility standards, plaintiffs have given us no indication that such an event is likely to occur.

is followed, the rights of all parties are preserved; none in prejudiced by a decision which in the statutory scheme was only preliminary." *Id.*, at 40. *See also Gjertsen v. Board of Election Commissioners of the City of Chicago,* No. 84-1373, slip op. at 5 (7th Cir. Dec. 14, 1984); *Commodity Futures Trading Commission, supra,* 701 F.2d at 656-57. We find no reason here to make an exception to that rule. We therefore vacate our opinion and order of October 11, 1984, and dismiss this case without prejudice.

DATED: JAN 25, 1985

ENTER: John D. Grady /s/
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA DANDRIDGE, etc., Plaintiff, v. GREGORY COLER, Director, et al., Defendants.	NO. 84 C 930

JUDGMENT ORDER

This cause came on to be heard on the motion of plaintiffs Luella Dandridge and all others similarly situated to alter or amend this court's judgment of October 11, 1984, or in the alternative, to vacate that judgment and dismiss this case without prejudice. The court having found that injunctive relief is now moot and plaintiffs' further claims are barred by the Eleventh Amendment,

IT IS HEREBY ORDERED that this court's Memorandum Opinion and Judgment Order of October 11, 1984, be vacated and this case is dismissed without prejudice.

DATED: JAN 25 1985

ENTER: John D. Grady /s/
United States District Judge

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article III, § 2, Cl. 1:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, — to all Cases Affecting Ambassadors, other public Ministers and Consuls; — to all Controversies to which the United States shall be a Party; — to Controversies between two or more States; — different States, — between citizens of the same State claiming Lands under Grants of different States, — and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

28 U.S.C. 2201:

> "*In a case of actual controversy* within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." (Emphasis supplied)

M.C.L.A. 400.37; M.S.A. 16.437:

> "Whenever an application is made for assistance, the county department of social welfare shall make a thorough investigation and report to the state department in the manner prescribed by it, giving its recommendation of the amount of assistance, if any, to be allowed. If the application be disallowed, or if the applicant is dissatisfied with the amount of assistance he is receiving, or is to receive, he may demand, in writing, a hearing of his case, as provided for in section 9 or section 65. The applicant or recipient may appeal to the circuit court of the county in which he resides, which court shall have power to review questions of law involved in any final decision or determination of the state department. Said petition shall be filed within 30 days of the receipt of such decision or determination. The petitioner shall not be required to furnish any bond and costs shall not be taxed against him. If the court shall decide in favor of the petitioner, assistance shall be paid from the first day of the month following the date of the application therefor or of the date of the original application for the relief in question."

45 C.F.R. 205.10(a) (3), (4), (5), in pertinent part:

> "(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act shall provide for a system of hearings under which:
>
> • • •
>
> (3) Every applicant or recipient shall be informed in writing at the time of application and at the time of any action affecting his claim:

(i) Of his right to a hearing, as provided in paragraph (a) (5) of this section;

• • •

(4) In case of intended action to discontinue, terminate, suspend or reduce assistance. . . :

(i) The State or local agency shall give timely and adequate notice, except as provided for in paragraphs (a) (4) (ii), (iii), or (iv) of this section. Under this requirement:

(A) 'Timely' means that the notice is mailed at least 10 days before the date of action, that is, the date upon which the action would become effective;

(B) 'Adequate' means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency hearing, and the circumstances under which assistance is continued if a hearing is requested;

• • •

(5) An opportunity for a hearing shall be granted to any applicant who requests a hearing because his or her claim for financial assistance. . .is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance,. . .

• • •

(iii) *The claimant shall be provided reasonable time, not to exceed 90 days, in which to appeal an agency action;*

* * *"

(Emphasis added.)